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FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 and 06-100

IN THE

Supreme Court of the United States

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MORTGAGE INSURANCE COMPANIES OF AMERICA AND CONSUMER MORTGAGE COALITION IN SUPPORT OF PETITIONERS

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November 13, 2006

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INTEREST OF *AMICI CURIAE*[1]

Mortgage Insurance Companies of America (MICA) and Consumer Mortgage Coalition (CMC) represent the interests of companies that issue mortgage insurance and make mortgage loans, respectively. Their members, accordingly, play a leading role in facilitating homeownership in America. Because both the premium charged for mortgage insurance and the terms of mortgage loans may depend in part on information about the potential homeowner's creditworthiness, the members of MICA and CMC – and the cause of expanded homeownership that they serve – have a strong interest in the Fair Credit Reporting Act (FCRA) issues presented in these cases.

MICA is a trade association that represents the private mortgage insurance industry in the United States. Its members provide private mortgage insurance to mortgage lenders that protects the lender if the homeowner defaults on the loan. Mortgage insurance allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. The private mortgage insurance industry insures over five million mortgages nationwide.[2]

CMC is a trade association of national mortgage lenders, servicers, and service providers. Those lenders make mortgage loans to Americans when they purchase or refinance homes; collectively, CMC's members make or are involved in facilitating millions of home loans each year.

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[1] Written consents of all parties have been filed with the Clerk of Court. This brief was authored solely by counsel for MICA and CMC, and no person or entity other than MICA and CMC, their members, or their counsel made any monetary contribution to the preparation or submission of the brief.

[2] All but one of the seven predominant companies in the industry are members of MICA.

CMC is committed to the proper interpretation and application of consumer mortgage laws and regulations, in order to foster homeownership through efficient and effective lending practices.

Members of MICA and CMC have been named as defendants in numerous putative class actions brought under FCRA.[3] These cases generally concern statutory questions of first impression and seek an award of unlimited statutory and punitive damages for an alleged willful violation of the Act's requirements. The Ninth Circuit's decision on certiorari here casts a dark shadow both over those many cases and over *amici*'s practices and procedures. For all of these reasons, MICA and CMC have a substantial interest in the outcome of the cases under review.

SUMMARY OF ARGUMENT

The Ninth Circuit launched from the erroneous premise that FCRA is a one-sided consumer protection statute where imposing more burdens and greater liability on business are presumptively favored. To the contrary, the Act affirmatively seeks to promote the nation's strong interest in the efficient flow and use of consumer information – an interest that is vitally important to the housing industry as well. Congress thus adopted a balanced approach that carefully limits both the availability of damages and the Act's notice requirements, in order to avoid undue interference with the flow and use of consumer information. The Ninth

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[3] See, *e.g.*, *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.); *Karwo v. CitiMortgage, Inc.*, No. 04-CV-1944 (N.D. Ill.); *Frye v. Chase Home Mortgage Corp.*, No. 05-825 (W.D. Ky).

Circuit's faulty interpretations of the Act's standard for imposing statutory and punitive damages and of its adverse action notice provisions contravene the balance that Congress struck and should be reversed.

The Ninth Circuit's distorted interpretation of the test for statutory and punitive damages is not just wrong, but would impose grave and unjustifiable burdens on mortgage lenders and insurers and, indirectly, on prospective homeowners. That diffuse and wholly subjective standard would afford no reliable protection to companies subject to the Act and would drive them to adopt overly cautious approaches to the use of consumer information. That effect would be especially powerful both because mortgage lenders and mortgage insurers engage in millions of transactions annually, thereby potentially exposing them to massive damages under the ruling below, and because many issues concerning the application of FCRA to mortgage loans and mortgage insurance remain unanswered. The result would be a restricted flow of consumer information, a consequent decline in the use of such information in ways that help consumers, and a sharply reduced availability of the kinds of risk-priced mortgage loans and mortgage insurance that facilitate homeownership.

The Ninth Circuit's interpretations of the adverse action provisions are likewise both wrong and dangerous. Not only does the Act not require a company to try to compare a consumer to the hypothetical most creditworthy billionaire, but – as an even more basic threshold matter – the duty to give notice upon an "increase" in a charge plainly does not apply to an *initial* charge for a new loan or mortgage insurance policy. The Ninth Circuit's contrary readings would impose needless burdens on users of credit information and cause unnecessary confusion for consumers, all contrary to the Act's goals. This Court, in any event, should limit its ruling on the meaning of adverse action to the particular facts at issue here. Consumer information is used in different ways by different industries, depending on their unique facts

and circumstances. The mortgage industry, for example, does not use consumer information in the same way as petitioners. These variations strongly counsel against broad pronouncements, particularly given the plethora of litigation pending against *amici*'s members and other companies.

ARGUMENT

I. FCRA IS A BALANCED STATUTE THAT SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND EVENHANDED OBJECTIVE, NOT BY SUBSERVIENCE TO AN ALLEGED "CONSUMER PROTECTION" PURPOSE

The Ninth Circuit's decision is grounded on the erroneous premise that FCRA should be interpreted in a lopsided manner because "FCRA is a consumer protection statute." 435 F.3d at 1092. The court specifically pointed as justification for its rulings that the outcomes advanced "the statutory mandate of ensuring that consumers are notified when their credit information has been used against them." *Id.* at 1099; see also *id.* at 1091-92 ("Congress sought to promote the rights of consumers"). From that foundation, the court determined, *inter alia*, that (i) adverse action notices must be sent as to new insurance policies, (ii) the statute is triggered even where the consumer's policy rate is no worse than if her credit information had not been used, (iii) the statute is triggered even where there is no credit information on the consumer at all, (iv) companies not even involved in underwriting and rate setting could be held liable, and (v) willfulness could rest on proof of mere reckless disregard of the law and could be shown by evidence that the legal compliance advice was too "creative" for the taste of a court or jury.

The Ninth Circuit's basic premise was faulty and led the court to the wrong results. As we now show, (A) Congress recognized and sought to promote a strong federal interest in the free and efficient flow of consumer infor-

mation, and (B) FCRA codifies a balanced and evenhanded approach designed to avoid undue interference with that strong interest.

A. FCRA Seeks to Promote the Efficient Flow and Use of Consumer Information by Businesses, Which is Vital to the Housing Industry in Particular and to the Economy as a Whole

Recent advances in technology have dramatically affected the consumer reporting industry.[4] The computerization of records, development of the Internet, and ability to transmit data electronically have enabled the timely flow of information about consumer accounts to consumer reporting agencies, and then from those agencies to numerous kinds of entities whose operations are enhanced by the use of that information.[5]

This flow of consumer information among businesses is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It also further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). In short, "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system ...." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

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[4] S. Rep. No. 185, 104th Cong., 1st Sess. 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[5] R. Avery *et al.*, An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin at 49 (Feb. 2003) (estimating that each consumer reporting agency receives more than two billion items of information each month) (www.federalreserve.gov/pubs/bulletin/ 2003/0203lead.pdf).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized consumer reporting agencies to disclose consumer information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The Federal Trade Commission (FTC) has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[6] Among the benefits conferred by the rapid sharing of consumer information are nearly instantaneous qualification for mortgage, automobile, and retail credit, higher levels of home ownership, and increased availability of non-mortgage credit for low-income households.[7] According to Congress, these benefits have saved consumers as much as $100 billion annually.[8]

B. In Recognition of that Strong Interest, FCRA Codifies A Balanced Approach Designed to Avoid Undue Interference with the Flow and Use of Consumer Information

Given Congress's strong interest in promoting the flow and use of consumer information by business, the Ninth Circuit fundamentally erred in construing FCRA so as to

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[6] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004) (www.ftc.gov/reports/facta/041209factrpt.pdf).

[7] H. Rep. No. 263, 10th Cong., 1st Sess. 23 (2003).

[8] *Id.*

promote a one-sided policy of consumer protection. FCRA "seeks to *balance* the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 209, 103rd Cong., 2d Sess. (1993) (emphasis added); see also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Equifax Inc. v. FTC*, 678 F.2d 1047, 1049 n.3 (11th Cir. 1982) ("Congress made clear that FCRA was intended to be a balanced regulatory scheme").

The adverse action and civil liability rules are emblematic of this balance. While notice of adverse action is required in a variety of circumstances, it may be given in oral, written or electronic form; it need not be given contemporaneous with the action itself; it need only refer the consumer to the appropriate consumer reporting agency for further information; and FCRA does not require the creditor or insurer to explain the decision or adverse action in detail. 15 U.S.C. § 1681m(a). The civil liability provisions also are measured in certain respects. Unlike many aspects of federal laws regulating consumer transactions, FCRA is not a strict liability statute.[9] No liability arises under FCRA for innocent or non-negligent violations (15 U.S.C. §§ 1681n, 1681o), nor is there a private right of action attached to several of its provisions (*id.* §§ 1681d(c), 1681g(e)(7), 1681m(h)(8)(A), 1681s-2(c)).[10] On the other hand, unlike most federal stat-

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[9] Compare 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act); 15 U.S.C. § 1693m (Electronic Funds Transfer Act); 15 U.S.C. § 1667d (Consumer Leasing Act); 15 U.S.C. § 2310(d) (Magnuson Moss); 15 U.S.C. § 1691e (aspects of Equal Credit Opportunity Act); 12 U.S.C. § 2605(f) (aspects of Real Estate Settlement Procedures Act).

[10] Congress repealed the private right of action for liability under FCRA § 1681m when it enacted the Fair and Accurate Credit Transactions Act on December 4, 2003. Pub. L. No. 108-159, as

utes regulating consumer transactions involving credit and insurance, uncapped statutory and punitive damages are available for a willful violation of FCRA. *Id.* § 1681n.[11]

In sum, while *amici* certainly acknowledge that FCRA contains protections that benefit consumers, the Ninth Circuit plainly proceeded from an improper premise in assuming that FCRA should be liberally construed in favor of the consumer plaintiff in order "to further its objectives." 435 F.3d at 1092. The proper analysis should recognize that FCRA is a balanced statute, not a one-sided one.

II. THE NINTH CIRCUIT'S DISTORTED INTERPRETATION OF THE STANDARD FOR PUNITIVE AND STATUTORY DAMAGES UNDER FCRA WOULD IMPAIR THE EFFICIENT FLOW OF CONSUMER INFORMATION, CONTRARY TO A CENTRAL GOAL OF THE ACT

Under the decision below, a company can be deemed to have acted "willfully" – and thus ordered to pay massive classwide statutory and punitive damages – if its interpretation of its obligations on an issue of first impression under FCRA is later deemed by a jury, district judge, or appellate court to have been "implausible" or based on "creative lawyering."

As the contrary decisions of other circuit courts show and as petitioners' briefs confirm, the Ninth Circuit's construction is patently wrong under the principles of statutory construction. As we now show, that construction must also be rejected because it would defeat the Act's core balance by sharply impeding the efficient flow and use of consumer information by businesses. This is so because (A) this amor-

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codified in 15 U.S.C. § 1681m(h)(8)(A); see *Perry v. First Nat'l Bank*, 459 F.3d 816, 819-23 (7th Cir. 2006) (so holding).

[11] Compare, *e.g.*, 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act).

phous and diluted test provides no reliable protection against massive liability and thus would force companies to adopt approaches to consumer information that are excessively cautious; (B) that effect would apply not just to "adverse action" in the context at issue in these cases, but to the Act's many other provisions and across a wide swath of the American economy; and (C) this effect will be especially pernicious because many issues raised by FCRA, a complex and highly technical statute, remain unresolved.

A. The Ninth Circuit's Construction Would Undermine the Act's Goals

A standard under which massive classwide statutory and punitive damages may be awarded based on an after-the-fact appraisal that the company's position on a legal issue of first impression was not sufficiently "tenable," or that its lawyers' advice was too "creative," would defeat rather than promote the Act's core purposes in multiple respects. First, such a subjective and amorphous standard would drive companies to adopt overly cautious policies, thereby sharply constricting the flow and use of consumer information. Companies such as *amici*'s members are faced with a host of obligations under FCRA, both as "users" of information received from consumer reporting agencies and as "furnishers" of information to consumer reporting agencies. 15 U.S.C. §§ 1681b, 1681g(g), 1681i, 1681m, 1681s-2, 1681s-3. There is simply no way that a company can know, in advance, whether its position as to the meaning of any of the multitude of these requirements might later be found to be "implausible," insufficiently "tenable," or "unreasonable" – because those terms are wholly subjective and so provide no guidance to industry. Indeed, the fact that the district court agreed with the defendants' legal position as to adverse action, but that the Ninth

Circuit nevertheless held that its standard for statutory and punitive damages may be met, proves this point.[12]

The Ninth Circuit's standard, thus, would leave businesses with no reliable protection against runaway statutory and punitive damage awards. This is particularly troubling given the fact that many companies engage in millions of transactions affected by FCRA annually (or even monthly) and hence are tempting targets of class action cases seeking massive awards, even in the absence of any actual harm. In *amici*'s experience, companies would be pressured by such a standard to adopt the most cautious possible reading of each of the Act's various requirements. This inevitably would lead to less use, and less efficient use, of consumer information, expensive and unnecessary measures to avoid post-hoc criticism of compliance efforts, and hesitation on other aspects of statutory questions. Those effects, in turn, would defeat the Act's goal of fostering the flow and use of consumer information. In short, driving businesses to adopt the most cautious possible approach eviscerates the statutory balance that Congress enacted.[13]

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[12] Both the rules of statutory construction and constitutional principles render impermissible the kind of vague test for punitive damages adopted by the Ninth Circuit. Under the rule of lenity and similar principles, statutes that authorize punishment, including in the form of punitive damages, must be narrowly construed. See, *e.g.*, 3 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 58:4 at 99 (6th ed. 2001) ("[h]ighly regulatory statutes are strictly construed so that those covered by the statute have clear notice of what conduct the statute proscribes"). Due process, moreover, prohibits punishment absent clear advance notice of the proscribed conduct. See, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment") (citation omitted).

[13] This Court in other contexts has rejected statutory interpretations "courting intolerable risks of chilling legitimate"

Second, the Ninth Circuit's interpretation would undermine the attorney-client privilege and, in doing so, would weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers, lenders and other defendants may, as a practical matter, have to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

The pressure on the privilege arising in FCRA class actions is enormous. FCRA permits the award, in the case of a willful violation, of statutory damages of $100 to $1000 per violation plus punitive damages, all without upper limit, in addition to actual damages and attorneys' fees. 15 U.S.C. § 1681n. The attraction of such a bonanza has led virtually every plaintiff in FCRA class action lawsuits to seek such an award. *Amici*'s members are large institutions, and potential class sizes in cases against them and others are in their industry run into the hundreds of thousands (or even more). As a consequence, it is not unusual that potential liability in FCRA class action cases is in the hundreds of millions of dollars. The Ninth Circuit's cavalier comments that suggest that attorneys should be testifying, and the privilege waived, puts industry participants in an untenable position in these potentially massive lawsuits.

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conduct. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

The experience in the lower courts already has demonstrated the pernicious impact of the Ninth Circuit's ruling on the attorney-client privilege. In a case related to the cases at bar, the district court whose rulings were reversed by the Ninth Circuit's decision under review here has recently held that "advice of counsel" is a defense that must be pled, and the privilege waived, if the insurer hopes to defeat the contention that its violation of FCRA was willful. *Ashby v. Farmers Ins. Co. of Oregon*, No. CV 01-1446-BR (D. Or. Feb. 28, 2006) ("The [Ninth Circuit] opinion ... leaves open the possibility, albeit by a small margin, that an insurer might be able to establish it did not act willfully ... if the formulation of the notice was based on advice of counsel."). Further, in *White v. E-Loan, Inc.*, 2006 WL 2850041 (N.D. Cal. Oct. 25, 2006), the court denied the defendant's motion to stay discovery regarding willfulness, pending resolution of the threshold issue of whether FCRA was violated at all, thereby – due to the Ninth Circuit's decision – potentially requiring the defendant to waive attorney-client privilege before the merits are even litigated.

Experience arising from over 100 FCRA class actions filed in the Northern District of Illinois in the last two years alone is also instructive on this point. Those cases concern whether creditors violated FCRA § 1681b in how they made unsolicited "firm offers of credit," as permitted by the statute. In several of those cases,[14] defendants have stipulated to a partial waiver of the attorney-client privilege, faced with plaintiffs' contention that the Ninth Circuit's decision requires such a waiver in order to defend oneself from a will-

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[14] See, *e.g.*, *Murray v. GMAC*, No. 05-CV-1229; *Cerda v. First NLC Financial Services, LLC*, No. 06-CV-0735; and *Hernandez v. CitiFinancial Servs., Inc.*, No. 05-CV-2263.

fulness claim. In short, the dangerous consequences of the Ninth Circuit's ruling are already evident. [15]

Moreover, by putting such advice routinely at issue, the ruling below not only will force disclosure of privileged advice but is likely to discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance – lest such advice later be used against the client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant.[16] Alternatively, companies may be well advised to get second and third opinions, hoping that if several lawyers agree the advice might look better to the trier of fact. Rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the Ninth Circuit's statutory construction would undermine forthright legal advice and true compliance with the Act.

Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that even consultation with attorneys and reliance on their advice may not suffice to avoid a finding of willfulness if a court concludes in hindsight that the

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[15] Notably, a district judge in that court recently permitted a defendant to seek summary judgment as to willfulness without waiver of the privilege and granted the motion over plaintiffs' objection that the substance of the advice should have been disclosed. *Murray v. HSBC Auto Finance, Inc.*, 2006 U.S. Dist. LEXIS 74128 (N.D. Ill. Sept. 27, 2006). But the controlling legal standard of willfulness in the Seventh Circuit is not the Ninth Circuit's, but instead properly requires the much higher level of proof of intentional misconduct. *Wantz v. Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004).

[16] Compare *Upjohn*, 449 U.S. at 389 (the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

lawyers provided "indefensible answers." That holding put clients in the impossible situation of having to second-guess all of their attorneys, still further undermining both the privilege and compliance. It can safely be said that Congress never intended such a result when it enacted Section 1681n.

B. These Untoward Effects Would Be Felt Throughout the Statutory Scheme

Because statutory and punitive damages are available for the willful violation of *any* of the Act's requirements, and because the Act contains numerous requirements that affect a broad swath of the economy, these untoward effects will be particularly sweeping. Except where private suits are barred, FCRA authorizes such an award against "[a]ny person who willfully fails to comply with *any* requirement" of FCRA. 15 U.S.C. § 1681n(a) (emphasis added). That means that these problematic consequences will be felt throughout all of the Act's terms and across the many industries that it impacts.

As noted above, FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. Section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. Sections 1681c, 1681, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. And Section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information.

The Act's provisions also are not limited to the use of credit information, which was at issue in these cases. The

duties imposed by FCRA arise from the use of information in "consumer reports," a term that Congress defined to include not only credit information, but also "any information ... bearing on a consumer's ... character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). That definition has been construed to include such data as driving record information,[17] social security numbers, and even nicknames.[18]

Thus, the Ninth Circuit's interpretation of the word "willfully," if adopted, would affect much more than just the adverse action notification requirements of Section 1681m that are at issue in these cases. Approximately 250 cases have recently been filed, in courts spread out among many circuits, in which plaintiffs are seeking statutory and punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance under § 1681b.[19] A number of other class actions contend that creditors or insurers failed to send adverse action notices at appropriate times or challenge the sufficiency of notices that were sent.[20]

The Act's terms, moreover, broadly affect much of the economy. FCRA imposes obligations on consumer reporting agencies, on companies that furnish information to consumer reporting agencies and, in certain circumstances, on users of information contained in consumer reports. Thus,

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[17] See FTC Staff Letter from W. Haynes to M. Halpern, June 11, 1998 (http://www.ftc.gov/os/statutes/fcra/halpern.htm).

[18] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[19] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 2006 WL 741387 (N.D. Cal. Mar. 23, 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A (M.D. La. Mar. 28, 2006).

[20] See, *e.g.*, *Broessel v. Triad Guar. Ins. Corp.*; *Brantley v. Republic Mortgage Ins. Corp.*; and *Whitfield v. Radian Guar., Inc.*, all cited in note 3 *supra*.

although petitioners in these cases are personal lines insurers, consumer information is used by a wide array of lenders, retailers, employers, and government agencies.[21]

The same is true throughout the housing industry. First, insurance companies that write homeowners insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[22] Second, most mortgage lenders use the prospective homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[23] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports.

C. The Effects Would be Especially Pernicious Given that Many Issues Under FCRA are Still Unresolved

The damaging impacts from adopting the Ninth Circuit's view that an "implausible" answer to a novel issue justifies an award of unlimited statutory and punitive damages would be particularly powerful because FCRA is a complicated statute with many still-unresolved issues and little regulatory guidance. As is apparent from its text, FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five

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[21] See S. Rep. No. 209, 103d Cong., 2d Sess. 1-2 (1993).

[22] See, *e.g.*, S. Rep. No. 166, 108th Cong., 1st Sess. 7 (2003).

[23] *Id.*; see also General Accounting Office, Mortgage Financing: HUD Could Realize Additional Benefits from Its Mortgage Scorecard, GAO Report No. 06-435 at 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

separate meanings by the Act, each of which contains multiple parts. 15 U.S.C. § 1681a(k).[24] For credit transactions, FCRA incorporates another statutory scheme, the Equal Credit Opportunity Act and its governing regulations. Id., § 1681a(k)(1)(A). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C. § 1681s(a)(1), (e); 65 Fed. Reg. 80803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Revised commentary on FCRA, promised by FTC in early 2003, is still forthcoming. Federal banking agencies have certain regulatory authority for entities they regulate (15 U.S.C. § 1681s(e)), but have not chosen to exercise that authority in many instances. Notably, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In rul-

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[24] Because FCRA thus is a highly technical statute, the term "willfully" must be construed as requiring actual knowledge that the law is being violated. See *Cheek v. United States*, 498 U.S. 192 (1991) (tax code); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (currency transactions reporting act).

ing that it is, the court rejected prior district court rulings, including the ones in the cases on appeal.[25] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092-93.

Similarly, even the most basic issues relating to the Act's application to mortgage insurance remain unresolved. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against the risk it would face if the borrower defaults on a loan and the value of the home is insufficient to pay the amount of the outstanding mortgage. Because mortgage insurance is an integral part of a transaction in which a consumer is obtaining credit, a reasonable construction is that the so-called "credit" prong applies to mortgage insurance. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" applies instead. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial: if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, pt. I.C ("No adverse action occurs in a credit transaction where the creditor

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[25] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

makes a counteroffer that is accepted by the consumer."), incorporated into 15 U.S.C. § 1681a(k)(1)(A).

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send notices because they contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). Another district court has disagreed. *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-00004-JHM (W.D. Ky. Jan. 4, 2006).

In sum, the Ninth Circuit should have recognized – as many courts have – that issues of first impression do not lend themselves to the imposition of punishment or of punitive remedies.[26] Because FCRA presents many such issues, it is particularly important that the decision below be reversed.

III. THE NINTH CIRCUIT ALSO ERRED IN HOLDING THAT GEICO TOOK ADVERSE ACTION WITH RESPECT TO EDO

This Court's grant of certiorari in *GEICO* raises a second question: whether the Ninth Circuit correctly concluded that GEICO took "adverse action" under 15 U.S.C. § 1681m(a) when it issued a policy of automobile insurance to respondent Edo. The decision was premised on the twin con-

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[26] See, *e.g.*, *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1095 (Miss. 1995) (no punitive damages where "[t]he issue presented in this case is one of first impression in this state" and thus defendant "had no prior notice that its revised policy was contrary to our laws"); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) ("Because this is a case of first impression, Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct"); *Morgan Guar. Trust Co. v. American S&L Ass'n*, 804 F.2d 1487, 1500 (9th Cir. 1986).

clusions that the insurance rate was adversely affected by Edo's credit score and that this supposed adverse effect had resulted in an increase in the charge for insurance. The Ninth Circuit erred in both respects, and *amici* write separately to explain why each conclusion is inconsistent with the text and practical realities. Before doing so, however, *amici* address the nature of adverse action notices generally.

Adverse action notices required by FCRA are quite limited. By statute, the notice need only contain two kinds of information. First, the notice must provide notice "of the adverse action." 15 U.S.C. § 1681m(a)(1). Second, it must inform the consumer of the identity of the consumer reporting agency whose consumer report was used; of the right to obtain a free copy of a consumer report from that agency; of the right to dispute anything inaccurate in the report; and of the fact the agency did not make the adverse action decision. *Id.* § 1681m(a)(2), (3). Despite the Ninth Circuit's comments to the contrary, the notice need not explain "the nature of that action" or "how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future." 435 F.3d at 1085.

The bare-bones nature of the statutory requirement is not surprising, in light of the nature of consumer report information in the modern economy. It simply is not practical to require insurers and creditors to *explain* how the use of credit information has affected the consumer. Pricing algorithms are extremely complex. And, more importantly, it is not always clear, sometimes even to the insurer or creditor, why one consumer's credit score is not as favorable as another's. Credit scores (and similar numerical expressions of consumer report information) are often influenced, at least in part, not by the existence or absence of a delinquency or a default but by the number and extent of credit relationships, recent inquiries, and other factors. That is, one's credit score could be lower than another's simply because the consumer has less experience with credit, though that experience has been

positive. While circumstances such as these illuminate why it makes sense for the adverse action notice to merely inform the consumer that an adverse action has been taken, it also means that the notice contains limited guidance.

The benefit of adverse action notices, moreover, has been reduced as a result of the enactment of FACTA. Before FACTA, the adverse action notice had the advantage of triggering for a consumer the right to obtain a free credit report, which the consumer could examine and, presumably, seek to correct. But in FACTA, Congress provided that all American consumers have the right to an annual free credit report. 15 U.S.C. § 1681m(a)(3)(A). The benefit of the adverse action notice process thus has largely disappeared.

Indiscriminately requiring adverse action notices in most credit and insurance transactions would be baffling, off-putting, and counterproductive. Where, as in the case at bar, the consumer believes and understands that she is obtaining the product or service she requested, the notice of "adverse action" is inherently confusing. Individuals who obtained consumer reports might expend considerable time with consumer reporting agencies and entities that provide credit information addressing entries in their consumer reports – not understanding that the reports accurately reported their credit accounts, or that any "errors" in the reports were sufficiently minor that their ability to obtain credit or insurance was not impaired in any material way. Consumers, who had applied for and received a policy of insurance or loan satisfactory to them, might call users who had sent them adverse action notices, puzzled about what "adverse action" they had suffered.

Mortgage insurance presents an even more difficult situation. Mortgage insurance is a default policy for the lender, and so the mortgage insurer does not even have a relationship with the consumer. If adverse action notices were required from a mortgage insurer where an issued

policy was at a less-than-optimal rate, the notice would be confusing in the extreme, coming to a consumer who probably has not even heard of the mortgage insurer and often in connection with a loan that the consumer believed was being made.

For these reasons, and others, it is not surprising that Congress did *not* enact an approach calling for the indiscriminate distribution of adverse action notices in every conceivable situation, but instead drew lines that require notices only where doing so would be useful and would outweigh the various costs. As we now show, the Ninth Circuit's rulings crossed those lines.

A. The Court Erred In Finding That An Adverse Action Notice Was Required

The Ninth Circuit's decision, requiring an adverse action notice, was erroneous because (1) there was nothing adverse to Edo and (2) the issuance of an initial insurance policy was not an adverse action.

1. GEICO had no obligation to send an adverse action notice to Edo when it issued him an initial policy of automobile insurance, because it was undisputed that use of credit report information did not make Edo's policy premium any higher. 435 F.3d at 1093 n.12. The Ninth Circuit nonetheless held that GEICO took "adverse action" because FCRA "requires [adverse action] notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Id.* at 1093. This approach compared Edo with a hypothetical insured – indeed, the most creditworthy insured in the world.

That approach greatly, and erroneously, expands the scope of FCRA. The statute requires a notice where adverse action has occurred "based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). The plain import of this requirement is to mandate

a notice to Edo only if information in *Edo's* consumer report caused him to get a higher premium rate than he otherwise would have received had his consumer report not been considered. The statute does not by its terms create the duty of notification that compares the debtor or insured with *someone else*. GEICO acted properly in not telling Edo he had been adversely affected, because he had not been.

There are practical and policy reasons why the Ninth Circuit's approach makes little sense. For the consumer, there is little utility in being told that her experience in obtaining insurance or credit is less favorable than it would have been if she was the hypothetically most creditworthy person. The Ninth Circuit's requirement of a notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (435 F.3d at 1093), would send consumers off to study their reports for the often-futile purpose of identifying why they are not the best credit risk – a scenario that Congress simply did not intend.

Underlying the Ninth Circuit's construction of FCRA seems to be the mistaken assumption that every consumer might be eligible for the "best" rate because she might discover errors contained in her consumer reports of sufficient magnitude to result in lower premiums if the errors were corrected. In *amici*'s experience, that simply is not the case for the products they provide: a sub-optimal premium or interest rate, or loan term, is not a reliable indicator of the need for the consumer to investigate her credit report, and there is no basis to conclude that Congress believed otherwise. Likewise, the FTC's expected litigating position supporting the Ninth Circuit should not bolster that court's conclusion. The FTC has no rulemaking authority over the adverse action provisions of FCRA (see 16 C.F.R. § 1.73(a)(2)), and thus its views are not entitled to deference. Moreover, the Commission's current stance is inconsistent with its prior actions. The FTC has never brought any reported FCRA enforcement action in this area against an insurance company even though

such companies historically have not provided such notices.[27] Further, when FCRA was amended in 2003, the FTC supported a draft amendment that would have added a new requirement that insurers send a "Risk Based Pricing Notice" telling consumers that credit might adversely affect premium pricing – an amendment that would have been unnecessary if FCRA's adverse action provisions already required notices under those circumstances.

Finally, the Ninth Circuit argued that its interpretation "best comports" with FCRA's purpose of ensuring "[a]ccuracy and fairness of credit reporting." 435 F.3d at 1091 (citing 15 U.S.C. § 1681). As noted above, however, FCRA has multiple goals and seeks to strike a balance. Requiring that users of consumer notices send out numerous adverse action notices in situations specified by the Ninth Circuit might result in benefits to some, but, as noted above, those benefits are limited and come with the cost of consumer confusion in other instances. Assume, for example, that a consumer's policy of insurance was set for renewal, an insurer obtained consumer report information to evaluate the renewal, and the consumer's credit standing had improved so that a lower premium (but still not the best) was provided at renewal. Because the new premium was not the "best" hypothetical premium available, the insurer would be required to send a notice informing the consumer that he had been provided a new, lower premium – but also that the insurer had taken "adverse action" against him based on information in his consumer report.

In sum, because it was undisputed that Edo's premium was not higher than it would have been if his score had not been used, there was no notice duty in this case.

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[27] Although risk-based pricing of insurance based upon credit reports has evolved over the last decade, other types of consumer reports, such as motor vehicle reports, have been used for many years in pricing insurance.

2. The Court of Appeals also erred in its threshold ruling that "FCRA's adverse action notice requirement appl[ies] to the rates first charged in an initial policy of insurance" and is not "limited to an increase in a rate that the consumer has previously been charged." 435 F.3d at 1090. *Amici* urge the Court to address this initial holding, which finds no support in the plain language of the statute and which if reversed would require reversal of the Ninth Circuit's judgment.

Congress provided a multi-part definition of "adverse action." The part applicable to insurance matters, the "Insurance Prong" of the definition, states as follows:

> The term "adverse action" ...
>
> (B) means –
>
> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit held that there was an "increase" in GEICO's charge for insurance to Edo, even though it had not previously issued him a policy of insurance. The reasons that the court offered for that conclusion do not withstand scrutiny.

First, the court said that the ordinary meaning of the word "increase" is "to make something greater," which it believed should not "be limited to cases in which a company raises the rate that an individual has previously been charged." 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because "increase" means "to make something greater," there must necessarily have been an existing premium, to which Edo's actual premium may be compared, to determine whether an

"increase" occurred. Congress could have provided that "adverse action" in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an "increase." That definitional choice must be respected, not ignored. See *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) ("[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated").

Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words "existing or applied for," Congress intended that an "increase in any charge" for insurance must "apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy." 435 F.3d at 1091. This interpretation reads the words "existing or applied for" in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a "cancellation," "reduction," or "change" in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term "increase" also should be construed to apply to increases of an already-existing policy. See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("a phrase gathers meaning from the words around it") (citation omitted).

The Ninth Circuit stated that it was aware of "no sensible alternative reading" of the statute other than its view that the phrase "existing or applied for" modified each part of the definition that preceded it, and permitted adverse action for all types of insurance transactions, including ones where a pre-existing relationship was lacking. 435 F.3d at 1091. However, Congress used the disjunctive in the Insurance Prong, referring to insurance "existing or applied for," and so could have intended that the term "existing" govern certain listed insurance transactions, and "applied for" govern others. Under this reading, the term "existing" would apply to "cancellation," "increase" in charge, "reduction," or "unfa-

vorable change" in terms of insurance -- all terms that presuppose an existing policy. The term "applied for" would govern "a denial" of insurance, in which a consumer lacks an existing relationship with the insurer.[28]

At bottom, the Ninth Circuit view was that FCRA should be construed in whatever manner requires sending more notices. But Congress, well aware that "[m]eaningful disclosure does not mean *more* disclosure" (*Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 243 (2004) (citation omitted)), enacted a more nuanced – and more sensible – statutory scheme. It is well settled that courts must strictly adhere to the terms of legislation that "was the result of compromise between groups with marked but divergent interests." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 n.13 (1989) ("[s]trict adherence" to statutory language is required when statute "is the result of a series of carefully crafted compromises"). As we have shown, that is precisely the case with respect to FCRA. Under these circumstances, "the wisest course is to adhere closely to what Congress has written." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981). Because the Ninth Circuit strayed far from that course, its interpretations of the statute should be corrected.

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[28] Even if the court was right that there can be an "increase" where there was no prior charge, it could only be where an application is made for a policy or loan at a specific rate or charge and that specified rate or charge is increased, based on consumer information, before the sale. See, *e.g.*, Latour-Berger FTC Interpretive Letter (June 28, 2001) (http://www.ftc.gov/os/statutes/fcra/latour.htm). For example, a lender might indicate that it was applying for mortgage insurance at a particular rate but coverage might be granted only at a higher rate due to the consumer's credit profile. Surely, at the very least, there must be a first, lower number applied for before there can be said to have been an "increase" in the charge.

B. The Court Should Limit Its Ruling Concerning The Meaning of The Term "Adverse Action"

Whatever its decision, *amici* respectfully submit that the Court should be careful to limit its decision as to the adverse action issue to the specific factual context presented in the *GEICO* case. Several reasons counsel in favor of such a limited ruling.

Caution in the interpretation of the term "adverse action" is needed because FCRA has a broad regulatory scope. In FCRA, Congress permitted multiple different entities to use consumer information, including in connection with furnishing credit, for employment purposes, with underwriting of insurance, for eligibility for a government license of benefit, valuing the credit or prepayment risks of an existing credit obligation, and in connection with account reviews to assure that a consumer meets the terms of the account. See generally 15 U.S.C. § 1681b(a)(3).

Use of credit information arising from these multiple purposes is not monolithic, and the manner in which one industry uses consumer information will depend on facts and circumstances unique to that industry. For example, private passenger automobile insurers, such as respondent GEICO, offer one product (automobile insurance) and use a "tier" system, under which potential insureds are placed into one of multiple tiers based not only on credit information, but also on driving-related factors such as prior accidents, use of the vehicle, and vehicle type. Mortgage insurers, however, use a different approach, and pricing is impacted by the loan-to-value ratio as well as information about the proposed borrowers.[29] Lenders making mortgage loans offer borrowers a

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[29] Further, some mortgage insurance programs require that there be a credit score in order to issue a policy, unlike certain programs before the Ninth Circuit.

variety of differing loan products depending on a borrower's needs; how the consumer's credit information affects the interest rate offered will depend on a host of other factors relating to the credit product that the consumer has selected. These varied uses of consumer information further underscore the need for a narrow ruling on the term "adverse action."

Strictly limiting the scope of the Court's decision as to the meaning of the term "adverse action" is also vital in light of the stakes involved in FCRA litigation against *amici*'s members, and others. As explained above, creditors and insurers typically use consumer information in a host of different circumstances: in providing quotes to consumers shopping for rates, in evaluating applications, and in reviewing existing accounts. Because of this extensive use of consumer information, and because of FCRA's statutory penalty provision, the potential exists for very significant liability when a defendant's use of credit information is challenged in a class action setting. A narrow ruling on the term "adverse action" will help confine liability to those contexts where it is appropriately placed. *Cf. Fidelity Federal Bank & Trust v. Kehoe*, ___ U.S. ___, 126 S. Ct. 1612 (2006) (Scalia, J., concurring in denial of certiorari) (noting the "enormous potential liability, which turns on a question of federal statutory interpretation," that defendant faced in a class action under the Driver's Privacy Protection Act).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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November 13, 2006